

Montana Water Court
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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MILK RIVER BELOW WHITEWATER CREEK INCLUDING PORCUPINE CREEK (40O)

CLAIMANTS: Carole J. Brown; Rock Creek Lands Partnership; Ralph E. Ellsworth, Terri L. Ellsworth; Michael T. Kinney, LLC; Michael T. Kinney; Sue Ann Kinney; Frank Jones III; Roy Jones; Teresa M. Jones; Michael L. Jones; Keith Beil; Myla Beil	40O-115 40N 792-00 40N 13098-00 40N 130688-00 40N 168164-00 40N 188624-00 40N 188626-00	40O 30046559 40O 30064385 40O 30064386 40O 30064387 40O 30064388 40O 30064389
OBJECTOR: United States of America, Bureau of Reclamation		

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Clerk of the Montana Water Court on the above stamped date. Please read this Report carefully.

If you disagree with the Master's Findings of Fact, Conclusions of Law, or Recommendations; or if there are errors in the Report, you may file a written objection to the Report within **10 days** from the above stamped date. (Rule 23, Water Right Adjudication Rules.) If you file an objection, you must also mail a copy of the objection to all parties on the Service List found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the Service List must be filed with the Water Court. If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

On March 15, 2012, the Court, acting pursuant to Rule 53(e)(5), M.R.Civ.P., issued a Draft Master's Report with an Order Setting Time For Comment. The parties

were notified that: 1) failure to file comments or further documentation would be viewed as agreement with the findings, conclusions, and recommendations found in the Draft Master's Report, and 2) if the flow rate for claims 40N 13098-00, 40N 168164-00, and 40N 188624-00 were not established, a Request for Assistance would be sent to the DNRC to determine the historical flow rate for each claim.

On April 30, 2012, claimant Michael Kinney filed comments concerning the Draft Master's Report. Mr. Kinney's comments were helpful in clarifying the number of pumps associated with each point of diversion for claims 40N 168164-00, 40N 188624-00, and 40N 188626-00, and their relationship to one another. However, there was still not enough information to establish the correct historical flow rate for the pump located in Section 21 for claims 40N 168164-00 and 40N 188624-00.

On May 23, 2012, an Order Requesting DNRC Assistance Pursuant to Rule 12(b), W.R.Adj.R. was issued to determine the historical flow rate for claims 40N 13098-00, 40N 168164-00, and 40N 188624-00.

On July 5, 2012, Craig Karge, Water Resource Specialist with the DNRC, filed a Memorandum in response to the Request. Mr. Karge was able to determine the historical flow rates for claims 40N 168164-00 and 40N 188624-00. Not enough information was available for Mr. Karge to determine the historical flow rate for claim 40N 13098-00. No comments were filed concerning Mr. Karge's Memorandum.

Therefore, on July 25, 2012, an Order Setting Filing Deadline, and in the Alternative, Order for Field Investigation was issued to determine the historical flow rate for claim 40N 13098-00.

On October 19, 2012, Mr. Marvin Cross, Engineering Specialist with the Havre DNRC filed his Flow Rate Report for Rock Creek Lands Partnership. With the assistance of claimant Rock Creek Lands Partnership, Mr. Cross was able to determine the historical flow rate for claim 40N 13098-00. A copy of this Flow Rate Report will be placed in claim file 40N 13098-00 and implied claim file 40O 30064386.

No further comments have been received as of this date. Therefore, the Master finds that this Master's Report, incorporating the same terms as the draft report, the Memorandum in response to the May 23, 2012 Request for Assistance, and the July 25,

2012 Order Setting Filing Deadline, and in the Alternative, Order for Field Investigation is an accurate reflection of the parties' understanding.

BACKGROUND

Case 40O-115 originally included one claim, 40N 792-00. Claim 40N 792-00, and the remainder of the claims listed in the case caption were all identified in two 1991 Department of Natural Resources and Conservation Memorandums as having a unique situation regarding source. While several claims had prior proceedings, this Master determined judicial economy would be well served by attempting to resolve the outstanding issues with these claims now as the claims are able to receive Basin wide notice in both Basin 40O and Basin 40N. The end goal being that all six similarly situated claims are uniformly represented in the final Water Court decree.

Three claims were objected to: 40N 792-00 (Case 40O-115), 40N 168164-00 (Case 40N-31), and 40N 188624-00 (Case 40N-60). The proceedings for claim 40N 168164-00 and 40N 188624-00 were completed in the early 1990s. In 2008 an issue remark was placed on all six claims concerning source and flow rate as a result of the 1991 DNRC Memorandums. Claim 40N 168164-00 had some additional proceedings in 2009 resulting in the generation of implied claim 40N 30046559.

This Master's Report addresses a unique source situation for the six water right claims in this case. This unique situation involves the following elements:

- Two sources of water - Rock Creek, a source located in Basin 40N, and the Milk River, a source for the purposes of this case, located in Basin 40O.
- The confluence of these two sources.
- Vandalia Diversion Dam, the primary point of diversion for Glasgow Irrigation District.

The six claims in this case are located on a five mile stretch of Rock Creek (Basin 40N) that ceases to flow each spring. Vandalia Diversion Dam is located downstream about eight miles south and east from the confluence of Rock Creek (Basin 40N) and the Milk River (Basin 40O). Based upon the documentation in claim files and case files, the historical situation is:

- Rock Creek flows during spring runoff, and then ceases to flow each spring unless there is a heavy rain event.
- Rock Creek Canal Company was formed in 1902 to utilize Rock Creek water.
- Rock Creek Canal Company objected to several of the claims in this case during the adjudication of Basin 40N because it did not want the claims to identify the Company's diversion facilities or priority date.
- The Milk River backs up into Rock Creek due to Vandalia Diversion Dam.
- Water users developed other sources of water to supplement the use of Rock Creek Canal Company water.

Given this situation, it is impossible to tell whether the claims historically used only Rock Creek or only Milk River water. In reality, it is most likely the claims historically used both sources based upon availability.

The simplest way to represent this unique co-mingled source situation is to create an implied 40O claim from each 40N claim for the purpose of representing both sources. While both sources could appear on the face of each 40N abstract, because the sources are in two different basins - Rock Creek in Basin 40N and the Milk River in Basin 40O - the generation of an implied 40O claim is a better way to document the water use for the important administrative purposes of future notice and enforcement. With the generation of an implied 40O claim from each 40N claim, proper notice of any actions will be given to the claimants and other water users in both basins. And, if the claims are ever involved in an enforcement project, the claims will be included in both basins ensuring the water commissioner is aware of them whether the enforcement project is initiated in Basin 40O or Basin 40N.

It is also important to note the basin designation of a claim is dependent upon where the point of diversion is located. Therefore, a Basin 40O claim must have a point of diversion located in Basin 40O.

Thus, the 40N claim numbers identified in the case caption, with the exception of claim 40N 30046559, will retain Rock Creek as their source and will identify points of diversion in Basin 40N. The 40O implied claims generated in this case will identify the

Milk River as their source and will identify a point of diversion as the confluence of the Milk River and Rock Creek in Basin 40O. To that end, implied claim 40N 30046559 will be changed to 40O 30046559. The implied claims will also have an information remark under point of diversion. The information remark notes the initial point of diversion is Vandalia Diversion Dam, but under no circumstances may any of the claimants for these claims make a call on Glasgow Irrigation District or the United States of America (Bureau of Reclamation) to fulfill the claim requirements. This remark was drafted by the parties in the case. It has been modified slightly by the Court to accurately reflect the situation.

For each claim, this Report will recite procedural history and identify the recommended modifications.

FINDINGS OF FACT

PROCEDURAL HISTORY COMMON TO ALL CLAIMS IN CASE 40O-115

1. In 1991, two post decree Department of Natural Resources and Conservation (DNRC) Memorandums were filed with the Court. These Memorandums identified a co-mingled source situation within a five mile stretch of Rock Creek (Basin 40N). This five mile stretch of Rock Creek ceases flowing each spring. However, water can still be diverted in this five mile stretch of Rock Creek because the Vandalia Diversion Dam on the Milk River (Basin 40O) backs water up into this five mile stretch of Rock Creek.

Vandalia Diversion Dam is the primary diversion for Glasgow Irrigation District.

2. On May 8, 2008, the Court sent a letter to all current owners of the claims identified in the 1991 DNRC Memorandums. The letter informed the current owners about the unresolved issues raised by the 1991 DNRC Memorandums. The letter stated an issue remark would be added to the claims identifying the concerns raised by the 1991 DNRC Memorandums unless the current owners chose to resolve the issues through the Motion to Amend process.

3. On June 23, 2008, the Court sent another letter to the current owners informing each of them that the following issue remark had been placed on the six claims identified by the 1991 DNRC Memorandums:

DNRC MEMORANDUMS WERE FILED WITH THE COURT ON JANUARY 10 & AUGUST 16, 1991 INDICATING POTENTIAL ISSUES EXIST WITH THE SOURCE AND FLOW RATE FOR THIS CLAIM.

4. On December 1, 2010, this Master sent a Request for Assistance to the DNRC. The Request sought the following information: 1) identification of all water right claims in the co-mingled source situation identified by the 1991 DNRC Memorandums, and 2) a determination of whether the claims identified by the 1991 DNRC Memorandums were interbasin transfers with any of the surrounding basins.

5. On December 6, 2010, the DNRC filed its Memorandum in response to the Request for Assistance. The Memorandum identified the same six water rights identified by the 1991 DNRC Memorandums and stated all six claims were interbasin transfers. An interbasin transfer claim is a claim with points of diversion or places of use, or both, in multiple basins. In other words, the water crosses basin boundary lines during diversion or use.

6. On December 8, 2010, this Master sent a second Request for Assistance to the DNRC. This Request clarified the original Request and asked the DNRC to do a current determination using resources outside the 1991 DNRC Memorandums to determine if any other claims were involved in the co-mingled source situation.

7. On December 20, 2010, the DNRC filed its Memorandum in response to the second Request for Assistance, again identifying the same six claims.

8. Both Requests and the DNRC Memorandums in response were sent to the original parties in Case 40O-115, the claimants of the five other claims identified by the 1991 DNRC Memorandums, and the attorney for some of the claimants, Matthew W. Knierim. A period of time was set for all interested individuals to respond.

9. On January 18, 2011, Mr. Knierim, on behalf of claimants Michael T. Kinney LLC and Rock Creek Lands Partnership, filed a letter with the Court. The letter commented upon some recent proceedings Mr. Kinney had concluded with the Court regarding claim 40N 168164-00, and identified some further possibilities of co-mingled sources. No other comments were received.

10. To ensure claim 40N 792-00 and the five other claims identified by the 1991 DNRC Memorandums would be identified uniformly in the Water Court's final decree, and to resolve the issue remark placed on the claims in 2008 as required by § 85-2-248,

MCA, this Master determined it would be judicially expedient to include all claims in the proceedings for Case 40O-115.

11. Therefore, on April 28, 2011, this Master issued an Order Calling Claims in on Motion. The Order re consolidated Case 40O-115 to include claims 40N 792-00, 40N 13098-00, 40N 130688-00, 40N 168164-00, 40N 188624-00, 40N 188626-00, and implied claim 40N 30046559.

12. On May 17, 2011, a status conference was held to discuss the initial issues involved with the claims. Present were claimant, Carole J. Brown; attorney Matthew Knierim for the claimants with the exception of Ms. Brown and the Beils; attorney Roselyn Rennie and consultant Rita Frasure for the United States of America (Bureau of Reclamation), objector to claim 40N 792-00; consultant John Westenberg, for claimant Rock Creek Lands Partnership; and Craig Karge, Water Resource Specialist, Montana Department of Natural Resources and Conservation. During the status conference, the parties agreed further time was needed to review the claim files and other information filed with the Court in earlier case proceedings.

13. On May 20, 2011, an Order Setting Second Status Conference was sent to the parties. Attached to this Order was a large amount of material from the claim files and case files, along with a list of concerns identified by this Master's review of the claims and previous proceedings.

14. On July 19, 2011, the second status conference was held. Present were claimant, Carole J. Brown; attorney Matthew Knierim for the claimants with the exception of Ms. Brown; attorney John Chaffin made a special appearance for attorney Roselyn Rennie, the United States of America (Bureau of Reclamation), objector to claim 40N 792-00; consultants Rita Frasure and Keith Kerbel for the United States, objector to claim 40N 792-00; consultant John Westenberg, for claimants with the exception of Ms. Brown; and Craig Karge, Water Resource Specialist, Montana Department of Natural Resources and Conservation. Discussion mainly concerned how the point of diversion for the Milk River water should be identified. The parties again agreed further time would be helpful in resolving the list of concerns identified by this Master.

15. On November 3, 2011, the third status conference was held. Present were attorney Matthew Knierim for the claimants with the exception of Ms. Brown; attorney Roselyn Rennie, the United States of America (Bureau of Reclamation), objector to claim 40N 792-00; and Craig Karge, Water Resource Specialist, Montana Department of Natural Resources and Conservation. Claimant Carole J. Brown did not appear. The parties had not communicated further. Instead, they suggested this Master issue a Draft Master's Report.

16. On December 6, 2011, a third Request for Assistance was sent to the DNRC. This Request asked the DNRC to identify the legal land description for the confluence of Rock Creek (Basin 40N) and the Milk River (Basin 40O) for the purpose of placing the legal land description on the implied 40O claim abstracts as the point of diversion.

17. On January 20, 2012, the DNRC filed its Memorandum in response to the third Request for Assistance. The legal land description of the confluence of Rock Creek (Basin 40N) and the Milk River (Basin 40O) was identified as the SESWNW of Section 29, Township 31 North, Range 36 East, Valley County.

18. On February 13, 2012, the United States of America (Bureau of Reclamation) identified a clerical error in the legal land description identified by the January 20, 2012 DNRC Memorandum. The quarter section description identified by the Memorandum is the SESWNW. It should be SESWNE. This correction is based upon the map attached to the DNRC Memorandum.

19. Based upon a review of the map attached to the DNRC Memorandum, the correction suggested by the United States of America (Bureau of Reclamation) is appropriate.

CLAIM 40N 792-00; CLAIMANT: CAROLE J. BROWN; OBJECTOR: UNITED STATES

20. Claim 40N 792-00 was included in the Basin 40N Preliminary Decree issued August 13, 1985. No objections were filed to the claim in Basin 40N. The claim did not appear in the Basin 40N decree with any issue remarks.

21. Claim 40N 792-00 is an interbasin transfer claim. Such claims are decreed in each affected basin so all water users in those basins have the opportunity to review and

object to the claims as necessary. Claim 40N 792-00 was identified as diverting Milk River water (Basin 40O) and using it on a place of use located in Basin 40N.

22. Due to its interbasin status, claim 40N 792-00 was also included in the Basin 40O Preliminary Decree issued May 24, 1995. The decree abstract for Basin 40O left several elements blank that were identified in the Basin 40N decree. These elements were: flow rate, volume, maximum acres, period of use, point of diversion, and means of diversion. This was standard procedure at the time. The claim received objections from the United States of America (Bureau of Reclamation) to priority date, flow rate, acres irrigated, and place of use. The claim did not appear in the Basin 40O decree with any issue remarks.

23. On February 16, 2005, claim 40N 792-00 was consolidated into Water Court Case 40O-115.

24. On June 5, 2006, claimant, Carole J. Brown, and objector, the United States of America (Bureau of Reclamation) filed a Stipulation. The Stipulation proposed reductions to priority date and flow rate, and refined the place of use legal land descriptions. Two aerial photographs modified to illustrate the place of use, point of diversion, and direction of water flow were attached to the Stipulation. Copies of these modified aerial photographs have been placed in the claim file.

25. Attached to the Stipulation were seven affidavits from water users in the area with historical knowledge regarding the beneficial use of claim 40N 792-00. These affidavits support the stipulated priority date and flow rate of the claim.

26. Based upon the 2006 Stipulation, the foregoing information, and to make the claim current under Montana Supreme Court Claim Examination Rules, the following changes should be made to claim 40N 792-00 to accurately reflect its historical use and resolve the 2008 issue remark:

<u>PRIORITY DATE:</u>	APRIL 29, 1907	DECEMBER
	31, 1930	
<u>TYPE OF HISTORICAL RIGHT:</u>	FILED	USE
<u>FLOW RATE:</u>	6,000.00 GPM	3,200.00
	GPM	

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY. 40N 792-00, 40O 30064385.

VOLUME: 645.00 AF

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

SOURCE NAME: ROCK CREEK

~~SOURCE INCLUDES BACKED UP WATER FROM THE MILK RIVER.~~

PLACE OF USE:

<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
162.50						176.00
						E2 20
						31N 36E
						VALLEY
53.00						39.50
						SWSW 21
						31N 36E
						VALLEY

TOTAL: 215.50 **215.50**

REMARKS:

~~THIS APPROPRIATION OF WATER USES WATER IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). AS A RESULT IT WILL BE DECREED IN BOTH BASINS BEFORE COMING FINAL.~~

IMPLIED CLAIM NO. 40O 30064385 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 792-00, 40O 30064385.

27. Due to an oversight by the United States of America (Bureau of Reclamation) and claimant, a clerical correction should be made to claim 40N 792-00. As there is no filing to support the priority date proposed by the Stipulation, the type of historical right should be corrected from "filed" to "use." This correction is reflected above.

28. Implied Claim 40O 30064385 should be created with the same elements as parent claim 40N 792-00 as modified by this Report except for:

SOURCE NAME: MILK RIVER

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
	SESWNE				29 31N	36E VALLEY
					SEE REMARK	

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWSESW SECTION 21, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.

WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINT OF DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY TO THE OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM ON THE MILK RIVER IN THE SWSNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37 EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA DAM IS ASSERTED UNDER THIS WATER RIGHT.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN 40O) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED AUGUST 13, 1985.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED UPON INFORMATION IN CLAIM NO. 40N 792-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 792-00, 40O 30064385.

29. The generation of implied claim 40O 30064385 resolves the source portion of the 2008 issue remark on claim 40N 792-00.

30. As both issues identified by the 2008 remark, source and flow rate, have been resolved, the issue remark should be removed from the abstract of claim 40N 792-00.

CLAIM 40N 13098-00; CLAIMANT: ROCK CREEK LANDS PARTNERSHIP LLC

31. Claim 40N 13098-00 was included in the Basin 40N Preliminary Decree issued August 13, 1985. No objections were filed to the claim in Basin 40N. The claim did not appear in the Basin 40N decree with any issue remarks.

32. Based upon the foregoing information, and to make the claim current under Montana Supreme Court Claim Examination Rules, the following changes should be made to claim 40N 13098-00 to accurately reflect its historical use and resolve the 2008 issue remark:

FLOW RATE:

30,000.0

0 GPM

27,200.0

0 GPM

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY. 40N 13098-00, 40O 30064386.

VOLUME:

9,350.00 AF

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE ROCK CREEK DRAINAGE (BASIN 40N) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

IMPLIED CLAIM NO. 40O 30064386 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 13098-00, 40O 30064386.

33. Implied Claim 40O 30064386 should be generated with the same elements as parent claim 40N 13098-00 as modified by this Report except for:

SOURCE NAME: MILK RIVER

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
	SESWNE				29 31N	36E VALLEY
					SEE REMARK	

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE SWNESE SECTION 21, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.

WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINT OF DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY TO THE OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM ON THE MILK RIVER IN THE SWSWNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37 EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA DAM IS ASSERTED UNDER THIS WATER RIGHT.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN 40O) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED AUGUST 13, 1985.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED UPON INFORMATION IN CLAIM NO. 40N 13098-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 13098-00, 40O 30064386.

34. The generation of implied claim 40O 30064386 resolves the source portion of the 2008 issue remark on claim 40N 13098-00. The October 19, 2012 Flow Rate Report for Rock Creek Lands Partnership resolves the flow rate portion of the issue remark. As both issues identified by the 2008 remark, source and flow rate, have been resolved, the issue remark should be removed from the abstract of claim 40N 13098-00.

CLAIM 40N 130688-00; CLAIMANTS: RALPH AND TERRI ELLSWORTH

35. Claim 40N 130688-00 was included in the Basin 40N Preliminary Decree issued August 13, 1985. No objections were filed to the claim in Basin 40N. The claim did not appear in the Basin 40N decree with any issue remarks.

36. Based upon the foregoing information, and to make the claim current under Montana Supreme Court Claim Examination Rules, the following changes should be made to claim 40N 130688-00 to accurately reflect its historical use and resolve the 2008 issue remark:

FLOW RATE: 5,200.00 GPM

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY. 40N 130688-00, 40O 30064387.

VOLUME: 190.00 AF

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE ROCK CREEK DRAINAGE (BASIN 40N) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

IMPLIED CLAIM NO. 40O 30064387 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 130686-00, 40N 130688-00, **40O 30064387.**

37. The flow rate portion of the 2008 issue remark is resolved based upon information in the claim file. The flow rate has a keep flag and is below the DNRC's 17.00 GPM guideline. The flow rate portion of the 2008 issue remark was placed upon the abstract in error.

38. Implied Claim 40O 30064387 should be generated with the same elements as parent claim 40N 130688-00 as modified by this Report except for:

SOURCE NAME: MILK RIVER

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
	SESWNE				29 31N	36E VALLEY
					SEE REMARK	

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE SENWNW SECTION 22, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.

WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINT OF DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY TO THE OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM ON THE MILK RIVER IN THE SWSWNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37 EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA DAM IS ASSERTED UNDER THIS WATER RIGHT.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN 40O) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED AUGUST 13, 1985.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED UPON INFORMATION IN CLAIM NO. 40N 130688-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40N 130686-00, 40N 130688-00, **40O 30064387**.

39. The generation of implied claim 40O 30064387 resolves the source portion of the 2008 issue remark on claim 40N 130688-00.

40. As both issues identified by the 2008 issue remark, source and flow rate, have been resolved, the issue remark should be removed from the abstract of claim 40N 130688-00.

CLAIMS 40N 168164-00 & 40N 30046559; CLAIMANT: MICHAEL T. KINNEY LLC

41. Claim 40N 168164-00 was included in the Basin 40N Preliminary Decree issued August 13, 1985. Objections were filed to ownership, priority date, flow rate, volume, acres irrigated, and place of use in Basin 40N. The claim received issue remarks in the Basin 40N decree concerning overlapping places of use, acres irrigated, place of use, flow rate, and volume. Several notices of intent to appear were also filed for the claim.

42. On January 25, 1990, then claimant Rolf S. Dull, filed a Verified Motion to Amend. The Verified Motion proposed modifications to priority date, type of right, flow rate, volume, source, point of diversion, means of diversion, acres irrigated, place of use, and period of use.

43. On April 2, 1991, a Master's Report was issued for the claim. The Master's Report was adopted by the Court on April 19, 1991. Based upon Dull's 1990 Verified Motion, the Master's Report reduced the flow rate, reduced the number of acres irrigated and place of use, made the priority date more junior, and modified the type of right. The volume proposed by the Verified Motion was the same volume identified by the decree abstract. The volume remained as claimed. The issue remark concerning acres irrigated, place of use, flow rate, and volume was removed from the abstract. The issue remark concerning overlapping places of use remained unresolved. However, the remark was

removed at a later date based upon a DNRC Memorandum. *See* January 18, 1991 DNRC Memorandum regarding Cases 40N-29, 40N-31, 40N-60, and 40N-65.

44. The Master's Report did not make the proposed modifications to source, point of diversion and means of diversion, and period of use because these elements did not appear on the objection list for Basin 40N, and prior to 1997 there was no procedural ability to amend a water right claim. Dull's 1990 Verified Motion regarding these elements was deemed a late objection to the claim, and an issue remark was added to the claim questioning the source, point of diversion, means of diversion, and period of use.

45. An information remark was also added under the volume element of the claim stating the quantified volume is a result of a Stipulation filed with the Court on January 25, 1990. This is an error. The January 25, 1990 document is Rolf S. Dull's Verified Motion to Amend. The information remark referencing the 1990 Stipulation should be removed from the volume element of the claim. In addition, this claim as modified by the 2009 Master's Report is a direct flow irrigation claim, the quantified volume should be removed and the standard information remark added under the volume element.

46. Beginning in 2008, period of diversion and a general information remark noting the addition of this information appear on all water right claim abstracts. Some claims also received an issue remark questioning the period of diversion. Claim 40N 168164-00 received such an issue remark.

47. The Water Court is required to resolve issue remarks using the procedures set forth in § 85-2-248, MCA. Information in the claim file was not sufficient to resolve the issue remarks. Therefore, on July 14, 2009, an Order Requiring DNRC Conference Concerning Issue Remarks was issued by the Court. The Order directed claimant to confer with DNRC personnel in an informal effort to resolve the issue remarks concerning source, flow rate, point of diversion, means of diversion, period of use, and period of diversion.

48. On September 1, 2009, claimant Michael T. Kinney LLC, filed a Verified Motion to Amend Water Right Claim 40N 168164-00. The Verified Motion proposed modifications to point of diversion, means of diversion, period of use, and period of diversion, confirmed the claimed period of use, and stated the period of diversion should match the period of use.

49. On September 1, 2009, Craig Karge, DNRC Water Resource Specialist filed a Memorandum concerning his conference with claimant. The DNRC Memorandum states the claimant's Verified Motion resolved the point of diversion, means of diversion, period of use, and period of diversion issue remarks on the claim. The DNRC Memorandum also suggested generation of an implied claim to resolve the source portion of the 2008 issue remark.

50. On October 8, 2009, a Master's Report was issued for the claim. The Master's Report was adopted by the Court on December 23, 2009. Based upon the 2009 Verified Motion and the DNRC recommendations, the Master's Report left period of use as claimed, matched the period of diversion to the period of use, modified the points of diversion and means of diversion, left the flow rate as adjudicated by the Court in 1991, and generated implied claim 40N 30046559. The issue remarks concerning source, flow rate, point of diversion and means of diversion, period of use, and period of diversion were removed from the abstract of claim 40N 168164-00.

51. Based upon the foregoing, and the proceedings in this case, to make the claim current under the Montana Supreme Court Examination Rules, and to ensure that all six claims involved in the co-mingled source situation are identified in a similar manner, the following modifications should be made to claim 40N 168164-00:

FLOW RATE: 7,900.00 GPM

THE POINTS OF DIVERSION LISTED ON THIS CLAIM HAVE SEPARATE PUMPS. FOR POINT OF DIVERSION NO. 1, THE HISTORICAL FLOW RATE OF THE PUMP IS 5,400.00 GPM. FOR POINT OF DIVERSION NO. 2, THE HISTORICAL FLOW RATE OF THE PUMP IS 2,500.00 GPM.

FOR POINT OF DIVERSION NO. 1, THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY OF 5,400.00 GPM. 40N 168164-00, 40N 188624-00, 40O 30046559, 40O 30064388.

FOR POINT OF DIVERSION NO. 2, THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY OF 2,500.00 GPM. 40N 168164-00, 40O 30046559.

VOLUME: 1,420.00 AF

~~THE VOLUME QUANTIFICATION ON THIS CLAIM IS THE RESULT OF A STIPULATION FILED BY THE PARTIES WITH THE WATER COURT ON 1/25/1990. THE COURT HAS MADE NO DETERMINATION AS TO THE NEED FOR A VOLUME QUANTIFICATION ON THIS CLAIM AS PROVIDED FOR IN 85-2-234(6)(b)(iii), MCA.~~

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE ROCK CREEK DRAINAGE (BASIN 40N) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

52. Based upon the proceedings in this case, and to ensure that all six claims involved in the co-mingled source situation are identified in a similar manner, the following modifications should be made to claim 40N 30046559:

WATER RIGHT NUMBER: 40N 40O 30046559

VOLUME: 1,420.00 AF

~~THE VOLUME QUANTIFICATION ON THIS CLAIM IS THE RESULT OF A STIPULATION FILED BY THE PARTIES WITH THE WATER COURT ON 1/25/1990. THE COURT HAS MADE NO DETERMINATION AS TO THE NEED FOR A VOLUME QUANTIFICATION ON THIS CLAIM AS PROVIDED FOR IN 85-2-234(6)(b)(iii), MCA.~~

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

SOURCE: MILK RIVER

SOURCE: - ROCK CREEK

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
						2 SWSWNW
						7 30N 37E
						VALLEY
						DAM
						NWNESE
						21 31N 36E
						VALLEY
						PUMP
						NENWNE
						28 31N 36E
						VALLEY
						PUMP
						SESWNE
						29 31N 36E
						VALLEY
						SEE REMARK

~~WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO SECONDARY POINTS OF DIVERSION NO(S) 2 AND 3.~~

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO SECONDARY POINTS OF DIVERSION IN THE NWNESE

**SECTION 21, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY AND THE
NENWNE SECTION 28, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.**

Reservoir: ONSTREAM Reservoir Name: VANDALIA DAM

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
					2 SWSWNW 7 30N
					37E VALLEY

**WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINTS OF
DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY
TO THE OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM
ON THE MILK RIVER IN THE SWSWNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37
EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA
DAM IS ASSERTED UNDER THIS WATER RIGHT.**

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN
400) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) **AND THE MILK RIVER
DRAINAGE (BASIN 400).** ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE
OBJECTION PERIODS FOR EITHER BASIN.

**THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE
ISSUED AUGUST 13, 1985.**

~~THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 400 PRELIMINARY DECREE
ISSUED MAY 24, 1995.~~

**CLAIM 40N 188624-00; CLAIMANTS: FRANK, ROY, MICHAEL, & TERESA JONES;
KEITH & MYLA BEIL**

53. Claim 40N 188624-00 was included in the Basin 40N Preliminary Decree
issued August 13, 1985. Objections were filed to ownership, flow rate, volume, acres
irrigated, and place of use in Basin 40N. The Court called the elements of flow rate,
volume, and acres irrigated in on motion. The claim received issue remarks in the Basin
40N decree concerning overlapping places of use, acres irrigated, place of use, flow rate,
and volume. A notice of intent to appear was also filed for the claim.

54. On February 5, 1990, then claimant Black Ranch Inc., filed a Verified Motion
to Amend Water Right Claim 40N 188624-00 and an Affidavit. The Verified Motion
proposed modifications to priority date, type of right, flow rate, volume, source, point of
diversion, means of diversion, acres irrigated, place of use, and period of use. The
Affidavit supported the flow rate and priority date proposed by the Verified Motion.

55. On March 16, 1990, a Master's Report was issued for the claim. The Master's
Report was adopted by the Court on July 3, 1990. Based upon Black Ranch's 1990
Verified Motion and Affidavit, the Master's Report reduced the number of acres irrigated
and place of use, reduced the flow rate, and reduced the volume.

56. The type of historical right was included as use and the issue remark concerning acres irrigated, place of use, flow rate, and volume was removed from the abstract at a later date based upon the modifications made by the Master's Report. The issue remark concerning overlapping places of use remained unresolved. However, the remark was removed at a later date based upon a DNRC Memorandum. *See* January 18, 1991 DNRC Memorandum regarding Cases 40N-29, 40N-31, 40N-60, and 40N-65. The quantified volume was also removed from the abstract and the standard information remark for a direct flow irrigation claim was added to the abstract.

57. The Master's Report did not make the proposed modifications to priority date, source, point of diversion, means of diversion, and period of use because these elements did not appear on the objection list for Basin 40N, and prior to 1997 there was no procedural ability to amend a water right claim. Black Ranch's 1990 Verified Motion regarding these elements was deemed a late objection to the claim. However, the issue remark added to this claim regarding the late objection concerned only means of diversion. The remark did not include the other elements identified in the Verified Motion: priority date, source, point of diversion, and period of use.

58. On March 14, 2011, co-claimants Keith and Myla Beil, filed a Verified Motion to Amend Water Right Claim 40N 188624-00. On April 4, 2011, co-claimants Michael and Teresa Jones filed a Verified Motion to Amend Water Right Claim 40N 188624-00. The Verified Motions proposed a correction to the place of use legal land description for the 125.00 acres located in the N2N2 of Section 33, Township 30 North, Range 36 East. The Verified Motions proposed the Township be corrected to 31 North. This correction actually identifies the legal land description as it was decreed by the Court. Between the issuance of the decree abstract and presently, the township was changed to 30 North. This appears to be a database entry error, and should be corrected at this time. Frank Jones, III and Ray Jones were given the opportunity to comment upon this correction at the Draft Master's Report stage. No comment was filed, indicating they have no objection to this correction.

59. The August 16, 1991 DNRC Memorandum also identified two errors and one item of note. First, the point of diversion identified as the SENWSE of Section 21, Township 31 North, Range 36 East identified by Black Ranch's 1990 Verified Motion should be identified as the NWNESE of Section 21, Township 31 North, Range 36 East. Second, the legal land description for the 40 acres located in the SENE of Section 3,

Township 30 North, Range 36 East identified by Black Ranch's 1990 Verified Motion should be identified as the NESE of Section 3, Township 30 North, Range 36 East. This appears to be a database entry error as the same parcel is described on supplemental claim 40N 188626-00. See August 16, 1991 DNRC Memorandum, attachments C.1 and C.2. Priority Date. Attachment C.1 also states the priority date cannot be before 1921 because this is the year Vandalia Diversion Dam was completed. Claimants were notified of this in the Draft Master's Report and the Order Setting Filing Deadline for comment on the Draft Master's Report. No comment was filed, indicating claimants have no objection to the later priority date.

60. The correction proposed by the August 16, 1991 DNRC Memorandum to the point of diversion results in claims 40N 168164-00, implied claim 40O 30046559, and claim 40N 188624-00 identifying the same point of diversion. Michael T. Kinney LLC was given the opportunity to comment upon this correction at the Draft Master's Report stage. No comment was filed, indicating it has no objection to this correction.

61. Based upon the 1990 Black Ranch Verified Motion, the 2011 Beil and Jones Verified Motions, and the foregoing information, the following changes should be made to claim 40N 188624-00 to accurately reflect its historical use and resolve the means of diversion issue remark and the 2008 issue remark:

PRIORITY DATE: ~~APRIL 1, 1903~~ **DECEMBER**
31, 1921

FLOW RATE: ~~2,000.00 GPM~~ **5,400.00**
GPM

**THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP.
THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL
PUMP CAPACITY. 40N 168164-00, 40N 188624-00, 40O 30046559, 40O 30064388.**

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
NWNESE	SENWSE		21	31N	36E	VALLEY HAND PUMP
SESENW		3	31N	36E	VALLEY	HAND PUMP

PERIOD OF USE: ~~FEBRUARY 15 TO NOVEMBER 19~~
APRIL 1 TO NOVEMBER 1

PLACE OF USE: (ONLY 2 PARCELS NEED CORRECTION)

<u>ID</u>	<u>ACRES</u>	<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
8	125.00		N2N2		33	31N 30N	36E VALLEY
12	40.00	NESE	SENE		3	30N	36E VALLEY

REMARKS:

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40O 152270-00, 40N 188624-00, **40N 188626-00, 40O 30064388, 40O 30064389.**

THIS APPROPRIATION OF WATER TAKES WATER FROM THE ROCK CREEK DRAINAGE (BASIN 40N) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

IMPLIED CLAIM NO. 40O 30064388 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

THE PERIOD OF USE WAS AMENDED BY THE WATER COURT PURSUANT TO SECTION 85-2-233(6), MCA.

62. The flow rate portion of the 2008 issue remark on claim 40N 188624-00 is resolved based upon the April 30, 2012, Michael Kinney comments concerning the Draft Master's Report and the July 5, 2012, DNRC Memorandum filed in response to the May 23, 2012 Request for Assistance.

63. Implied Claim 40O 30064388 should be generated with the same elements as parent claim 40N 188624-00 as modified by this Report except for:

PRIORITY DATE:

DECEMBER 31, 1921

SOURCE NAME: MILK RIVER

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>
	SESWNE				29 31N	36E VALLEY
					SEE REMARK	

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NWNESE SECTION 21, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.

WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINT OF DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY TO THE OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM ON THE MILK RIVER IN THE SWSWNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37 EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA DAM IS ASSERTED UNDER THIS WATER RIGHT.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN 40O) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED AUGUST 13, 1985.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED UPON INFORMATION IN CLAIM NO. 40N 188624-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40O 152270-00, 40N 188624-00, 40N 188626-00, 40O 30064388, 40O 30064389.

64. The generation of implied claim 40O 30064388 resolves the source portion of the 2008 issue remark on claim 40N 188624-00.

65. As both issues identified by the 2008 issue remark, source and flow rate, have been resolved, the issue remark should be removed from the abstract of claim 40N 188624-00.

**CLAIM 40N 188626-00; CLAIMANTS: FRANK, ROY, MICHAEL, & TERESA JONES;
KEITH & MYLA BEIL**

66. Claim 40N 188626-00 was included in the Basin 40N Preliminary Decree issued August 13, 1985. No objections were filed to the claim in Basin 40N. The claim did not appear in the Basin 40N decree with any issue remarks.

67. Claim 40N 188626-00 is an interbasin transfer claim. Such claims are decreed in each affected basin so all water users in those basins have the opportunity to review and object to the claims as necessary. Claim 40N 188626-00 was identified as diverting Milk River water (Basin 40O) and using it on a place of use located in Basin 40N. Due to its interbasin status, claim 40N 188626-00 was also included in the Basin 40O Preliminary Decree issued May 24, 1995. The decree abstract for Basin 40O left several elements blank that were identified in the Basin 40N decree. These elements were: flow rate, volume, maximum acres, period of use, point of diversion, and means of diversion. This was standard procedure at the time. No objections were filed to the claim in Basin 40O. The claim did not appear in the Basin 40O decree with any issue remarks.

68. Based upon the foregoing information, and to make the claim current under Montana Supreme Court Claim Examination Rules, the following changes should be made to claim 40N 188626-00 to accurately reflect its historical use and resolve the 2008 issue remark:

FLOW RATE:

6,000.00 GPM

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT USE THE SAME PUMP. THE COMBINED FLOW RATE FOR THESE RIGHTS IS LIMITED TO THE HISTORICAL PUMP CAPACITY. 40N 188626-00, 40O 30064389.

VOLUME:

1,350.00 AF

THE TOTAL VOLUME OF THIS RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

SOURCE NAME:

ROCK CREEK

~~SOURCE INCLUDES BACKED UP WATER FROM THE MILK RIVER.~~

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE ROCK CREEK DRAINAGE (BASIN 40N) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

IMPLIED CLAIM NO. 40O 30064389 WAS AUTHORIZED AND GENERATED BASED ON INFORMATION IN THIS CLAIM.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40O 152270-00, 40N 188624-00, 40N 188626-00, 40O 30064388, 40O 30064389.

69. The flow rate portion of the 2008 issue remark is resolved based upon information in the claim file. The flow rate has a keep flag and is below the DNRC's 17.00 GPM guideline. The flow rate portion of the 2008 issue remark was placed upon the abstract in error.

70. Implied Claim 40O 30064389 should be generated with the same elements as parent claim 40N 188626-00 as modified by this Report except for:

SOURCE NAME:

MILK RIVER

POINT OF DIVERSION AND MEANS OF DIVERSION:

<u>GOVT LOT</u>	<u>QTR SEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>	<u>MEANS</u>	
	SESWNE				29 31N	36E	VALLEY
					SEE REMARK		

THE POINT OF DIVERSION AND MEANS OF DIVERSION IS THE CONFLUENCE OF ROCK CREEK AND THE MILK RIVER.

WATER DIVERTED FROM THE MILK RIVER IS CONVEYED TO ROCK CREEK WHICH IS USED AS A NATURAL CARRIER TO A SECONDARY POINT OF DIVERSION IN THE NENWNE SECTION 28, TOWNSHIP 31 NORTH, RANGE 36 EAST, VALLEY COUNTY.

WATER FROM THE MILK RIVER BACK FLOWS TO THE SECONDARY POINT OF DIVERSION LOCATED ON ROCK CREEK. THIS BACK FLOW OCCURS INCIDENTALLY TO THE

OPERATION OF VANDALIA DAM. VANDALIA DAM IS LOCATED DOWNSTREAM ON THE MILK RIVER IN THE SWSWNW OF SECTION 7, TOWNSHIP 30 NORTH, RANGE 37 EAST, VALLEY COUNTY. NO RIGHT TO CONTROL THE OPERATION OF VANDALIA DAM IS ASSERTED UNDER THIS WATER RIGHT.

REMARKS:

THIS APPROPRIATION OF WATER TAKES WATER FROM THE MILK RIVER DRAINAGE (BASIN 40O) AND USES IT IN THE ROCK CREEK DRAINAGE (BASIN 40N) AND THE MILK RIVER DRAINAGE (BASIN 40O). ANY OBJECTION TO THIS RIGHT MAY BE FILED DURING THE OBJECTION PERIODS FOR EITHER BASIN.

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 40N PRELIMINARY DECREE ISSUED AUGUST 13, 1985.

THIS IMPLIED CLAIM WAS AUTHORIZED BY THE WATER COURT BASED UPON INFORMATION IN CLAIM NO. 40N 188626-00.

WHENEVER THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE COMBINED TO SUPPLY WATER FOR THE CLAIMED PURPOSE, EACH IS LIMITED TO THE HISTORICAL FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE. 40O 152270-00, 40N 188624-00, 40N 188626-00, 40O 30064388, 40O 30064389.

71. The generation of implied claim 40O 30064389 resolves the source portion of the 2008 issue remark on claim 40N 188626-00.

72. As both issues identified by the 2008 issue remark, source and flow rate, have been resolved, the issue remark should be removed from the abstract of claim 40N 188626-00.

CONCLUSIONS OF LAW

1. The Montana Water Court has jurisdiction over all matters relating to the determination of existing water rights. Section 3-7-224, MCA.

2. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R.

3. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

4. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

5. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

6. The objections to and notice of appearance for the claims in this case were resolved with the exception of the elements identified by the post decree Verified Motions to Amend, which were deemed late objections. The proceedings in this case have resolved these late objections.

7. The settlement documentation filed by claimant and objector, the United States (Bureau of Reclamation) for claim 40N 792-00 constitutes a voluntary reduction in the priority date and flow rate elements, and a refinement in the place of use. The reductions and refinement are within the parameters of the statement of claim. Rule 17(c), W.R.Adj.R.

8. The volume quantification on all direct flow irrigation claims shall be removed as authorized by § 85-2-234(6)(b)(i), MCA.

9. According to Rule 8, W.R.Adj.R., the Court may call in a claim to determine whether its elements accurately reflect pre-July 1, 1973 beneficial use. As directed by Rule 8, W.R.Adj.R., when a claim is called in on motion of the Court, the procedures outlined in § 85-2-248, MCA shall be followed.

10. Clerical mistakes arising from omission or oversight may be corrected by the court at any time. Rule 60(a), M.R.Civ.P.

11. The correction of the type of historical right for claim 40N 792-00 is a simple reclassification which entails no change in the actual use of the water. There is no adverse affect to other water users. Thus, additional notice is not required before this correction is implemented. *Geil v. Missoula Irrigation District*, 2002 MT 269, ¶ 53, 312 Mont. 320, 59 P.3d 398.

12. Pursuant to Rule 8, W.R.Adj.R. and § 85-2-248(9)(a),(b), MCA, modifications to the claims resulted in the addition of claims 40N 13098-00, 40N 130688-00, 40N 168164-00, 40N 188624-00, 40O 30046559, 40O 30064386, 40O 30064387, and 40O

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DATED this day of , 2013.

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